Supreme Court, U.S.
FILED
OCT 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-440 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBBY CLARDY, as Executrix of the Estate of Eugene Clardy, deceased, and CLARDY REALTY, INC., *Petitioners*,

v.

MARTHA HOFFMANN SANDERS, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

RESPONDENT'S BRIEF IN OPPOSITION

DONALD N. BERSOFF
BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400

RICHARD JORDAN AND
RANDY MYERS, P.C.
302 Alabama Street
Montgomery, AL 36104
(205) 265-4561

W. SIDNEY FULLER
28 South Court Square
Post Office Drawer 1637
Andalusia, AL 36240
(202) 222-4196

Attorneys for Respondent

* Counsel of Record

October 12, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

36 pp

QUESTIONS PRESENTED

1. Whether a punitive damage award of $2,750,000 for reprehensible conduct resulting in the loss of human life, under a unique wrongful death statute that prohibits compensatory damages, violates the Due Process Clause of the Fourteenth Amendment where the amount of the award was subject to an "extensive post-trial evidentiary hearing," and to searching *de novo* review by both trial and appellate courts?

2. Whether the Due Process Clause limits the substantive authority of the states to permit joint and several liability for jointly culpable tortfeasors?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

REASONS FOR DENYING THE WRIT 5

I. THE COURT SHOULD NOT GRANT REVIEW IN THIS CASE TO DECIDE WHETHER THE DUE PROCESS CLAUSE LIMITS THE SIZE OF PUNITIVE DAMAGE AWARDS.... 6

A. The Present Case Is *Sui Generis* And Is Not An Appropriate Vehicle For Considering Whether The Due Process Clause Imposes Substantive Or Procedural Limits On The Size Of Punitive Damage Awards 6

1. Alabama provides substantial and perhaps unique standards and procedures for assessing and reviewing punitive damage awards 7

2. Unlike the typical case, the propriety of this punitive award cannot be measured by reference to a compensatory award.... 15

B. The Due Process Limitation On Jury And Judicial Discretion Urged By Petitioners Finds No Support In Either Civil Or Criminal Law 18

II. THE COURT SHOULD NOT GRANT REVIEW TO DECIDE WHETHER THE DUE PROCESS CLAUSE PRECLUDES STATES FROM CHOOSING TO ALLOW JOINT AND SEVERAL LIABILITY FOR PUNITIVE DAMAGES ON JOINTLY CULPABLE TORTFEASORS 21

TABLE OF CONTENTS—Continued

Page

A. There Is No Authority For The Substantive Limit On Punitive Damage Awards Petitioners Propose, And No Reason For The Court To Consider Creating Such A Limit.... 22

B. This Case Would Be An Exceedingly Inappropriate Vehicle For Considering The Apportionment Question 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

	Page
Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986)	7, 15
Aetna Life Insurance Co. v. Lavoie, 505 So.2d 1050 (Ala. 1987)	10
Alcolac, Inc. v. Elam, 58 U.S.L.W. 3200 (U.S. Oct. 2, 1989) (No. 88-1992)	15
Alwan Brothers Co. v. Gnidovec, 109 S. Ct. 1315 (1989)	15
American General Life & Accident Insurance Co. v. Miller, 108 S. Ct. 2007 (1988)	15
Baldwin v. Alabama, 472 U.S. 372 (1985)	20
Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645 (1988)	7, 15
Berra v. United States, 351 U.S. 131 (1956)	19
Black Belt Wood Co., Inc. v. Sessions, 514 So.2d 1249 (Ala. 1986)	2, 14
Bowers v. Hardwick, 478 U.S. 186 (1986)	22
Browning-Ferris Industries v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989)	7, 15
Central Alabama Electric Cooperative v. Tapley, No. 87-1188 (Ala. May 12, 1989)	8, 10, 11
Coty v. Ramsey Associates, Inc., 149 Vt. 451, 546 A.2d 196 (1988)	24
Curry v. Baker, 479 U.S. 1301 (1986)	17
Eaton Corp. v. PKL Co., 109 S. Ct. 1933 (1989)	15
Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 19 P.2d 637 (1933)	24
Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So.2d 354 (1974)	2
Electrical Workers v. Foust, 442 U.S. 42 (1979)	7
Embrey v. Holly, 293 Md. 128, 442 A.2d 966 (1982)	24
Fredeen v. Stride, 269 Or. 369, 525 P.2d 166 (1974)	23
Freeman v. Sproles, 204 Va. 353, 131 S.E.2d 410 (1963)	24
Garcia v. United States, 769 F.2d 697 (11th Cir. 1985)	19
Gertz v. Welch, Inc., 418 U.S. 323 (1974)	17

TABLE OF AUTHORITIES—Continued

	Page
Getty Petroleum Corp. v. Salem Heat and Petroleum Corp., 109 S. Ct. 1642 (1989)	15
Giaccio v. Pennsylvania, 382 U.S. 399 (1966)	19
Goodyear Tire & Rubber Co. v. Hodder, 109 S.Ct. 3265 (1989)	15
Great Republic Insurance Co. v. Cheval, 109 S. Ct. 3218 (1989)	15
Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989)	8, 9, 10
Gregg v. Georgia, 428 U.S. 153 (1976)	20
Guy v. Johnson, 448 N.E.2d 1142 (Mass. App. 1983)	18
Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986)	2, 7, 8, 10
Hotel Riviera, Inc. v. Short, 80 Nev. 505, 396 P.2d 855 (1964)	24
Hoyt v. United States, 286 F.2d 356 (5th Cir. 1961)	18
Industrial Chemical and Fiberglass Corp. v. Chandler, Nos. 86-381, -385 (Ala. June 23, 1989)	8, 10, 14
Johnson v. Atlantic Coast Line R.R. Co., 142 S.C. 125, 140 S.E. 443 (1927)	24
Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923)	6
Lockett v. Ohio, 438 U.S. 586 (1978)	19
Longview Fibre Co. v. Jeannette Paper Co., 58 U.S.L.W. 3200 (U.S. Oct. 2, 1989) (No. 88-2051)	15
Louisville & Nashville R.R. v. Roth, 130 Ky. 759, 114 S.W. 264 (1908)	24
Massachusetts Bonding & Insurance Co. v. United States, 352 U.S. 128 (1956)	17
Mathews v. Eldridge, 424 U.S. 319 (1976)	25
Mauk v. Brundage, 68 Ohio St. 89, 67 N.E. 152 (1903)	24
McCleskey v. Kemp, 481 U.S. 279 (1987)	21
McGautha v. California, 402 U.S. 183 (1971)	19
McGee v. Int'l Life Insurance Co., 355 U.S. 220 (1957)	18

TABLE OF AUTHORITIES—Continued

	Page
Memphis Comm. Sch. Dist. v. Stachura, 477 U.S. 299 (1986)	17
Metromedia, Inc. v. April Enterprises, Inc., 109 S. Ct. 3242 (1989)	15
Miller v. Cudahy, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989)	15, 18
Moore v. City of East Cleveland, 431 U.S. 494 (1977)	23
Mutual Life Insurance Co. of New York v. Estate of Wesson, 108 S. Ct. 2035 (1988)	15
Nationwide Mutual Insurance Co. v. Clay, 109 S. Ct. 863 (1989)	15
Nelson v. Halvorson, 117 Minn. 255, 135 N.W. 818 (1912)	24
North Carolina v. Pearce, 395 U.S. 711 (1969)	14
Ohio Casualty Insurance Co. v. Downey Savings and Loan Ass'n, 108 S. Ct. 2023 (1988)	15
Palko v. Connecticut, 302 U.S. 319 (1937)	23
People v. O'Neill, 359 U.S. 1 (1959)	18
R. G. Britton v. Rogers, 631 F.2d 572 (8th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981)	20
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)	6, 27
Rubi v. Transamerica Title Ins. Co., 131 Ariz. 403 (Ct. App. 1981)	23
Santosky v. Kramer, 455 U.S. 745 (1982)	18
Shields v. Martin, 109 Idaho 132, 806 P.2d 21 (1985)	24
Smith v. Wade, 461 U.S. 30 (1983)	17
Solem v. Helm, 463 U.S. 277 (1983)	19
Southern Life & Health Insurance Co. v. Whitman, 358 So.2d 1025 (Ala. 1978)	8
St. Louis & South West Ry. Co. of Texas v. Thompson, 102 Tex. 89, 113 S.W. 144 (1908)	24
Stevens v. Armontrout, 787 F.2d 1282 (8th Cir. 1986)	20
Thompson v. Catalina, 205 Cal. 402, 271 P. 891 (1928)	24

TABLE OF AUTHORITIES—Continued

	Page
Tyler v. Judges of the Court of Registration, 179 U.S. 405 (1900)	27
United States v. Balint, 258 U.S. 250 (1922)	25
United States v. Batchelder, 442 U.S. 114 (1979)	18
United States v. Dotterweich, 320 U.S. 815 (1943)	25
United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983)	14
United States v. Tucker, 404 U.S. 443 (1972)	14
Vines v. Muncy, 553 F.2d 342 (4th Cir.), *cert. denied*, 434 U.S. 851 (1977)	20
Washington Gas-Light Co. v. Lansden, 172 U.S. 534 (1899)	22
Witherspoon v. Illinois, 391 U.S. 510 (1968)	20

CONSTITUTION AND STATUTES:

U.S. Constitution Amendment XIV	*passim*
Alabama Code § 6-5-391	2
Alabama Code § 12-22-71	10
Alabama Code § 13A-6-2(a)(1)	17
Alabama Code § 13A-6-3(a)(1)	17
Alabama Code § 13A-6-5(a)	17
Alabama Code § 32-5A-84	17
Alabama Code § 32-5A-178	17
Alabama Code § 32-5A-190	17
Alabama Code § 32-5A-191	2

MISCELLANEOUS:

Supreme Court Rule 17	4, 6, 22
Alabama Rules of Civil Procedure 59(f)	10
C. GAMBLE, ALABAMA LAW OF DAMAGES 490 (2d ed. 1988)	17
2 Alabama Trial Lawyers Journal 16 (Summer 1983)	14
3 Alabama Trial Lawyers Journal 46 (Winter 1984)	14
The Advertiser (Montgomery, Alabama) May 4, 1984	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-440

DEBBY CLARDY, as Executrix of the Estate of Eugene Clardy, deceased, and CLARDY REALTY, INC., *Petitioners*,

v.

MARTHA HOFFMANN SANDERS, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners describe this case as a "vehicular accident" in which petitioner Clardy's decedent and respondent's daughter were killed. Petition for Writ of Certiorari [hereinafter Pet.] at 4. But the conduct that resulted in a punitive damage award was not a simple "accident."

As set forth in the June 23, 1989 Opinion of the Alabama Supreme Court [hereinafter Opinion], respondent's sixteen-year old daughter, Norma Hoffmann, a high school honor student, was the innocent victim of a high speed nighttime drag race in a school zone on a residential street in Montgomery, Alabama between two drunken defendants, Thomas Clardy and James Kervin. Miss Hoffmann was killed (and her minor passenger seriously injured) when Clardy, whose blood alcohol level was

.21%,[1] attempted to pass Kervin at 80 MPH, crossed over a double yellow line, and smashed head-on into her car. Opinion, Pet. at 2a-3a. "[A]ll of the testimony, which included that of several eye-witnesses, showed that the accident was entirely the combined and concurring fault of Clardy and Kervin." Opinion, Pet. at 3a.

Respondent brought a civil action under Ala. Code § 6-5-391, which permits parents to sue for the wrongful death of their minor child. Following a lengthy trial, a jury awarded respondent $2.75 million in punitive damages.[2] No compensatory damages were awarded because they are barred under § 6-5-391, which "is designed to furnish a complete system for all actions for the death of a minor child." *Eich v. Town of Gulf Shores*, 293 Ala. 95, 97, 300 So.2d 354, 356 (1974). "[T]he damages recoverable under this section are entirely punitive and are based on the culpability of the defendant and the enormity of the wrong, and are imposed for the preservation of human life." *Id.* at 98, 300 So.2d at 356.[3]

As required by *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), the trial court conducted an extensive post-trial *evidentiary* hearing to determine if the jury's verdict was excessive. The trial court then en-

---

[1] That is far above the level of legal intoxication in all jurisdictions. *See, e.g.*, Ala. Code § 32-5A-191(a)(1) ("A person shall not drive . . . while there is 0.10 percent or more by weight of alcohol in his blood.").

[2] The jury found against the estate of Thomas Clardy, Clardy Realty, Inc., and James Kervin. The jury did not find against Kerwin's father, John, against whom respondent had made a claim of negligent entrustment of a motor vehicle because James Kervin had had five speeding tickets in the two years preceding the drag race. Opinion, Pet. at 2a.

[3] The Alabama wrongful death statute "has been judicially interpreted to authorize the recovery of *only* punitive damages." *Black Belt Wood Co., Inc. v. Sessions*, 514 So.2d 1249, 1262 (Ala. 1986) (emphasis in original).

tered an Order reciting the reasons why it concluded the verdict was not excessive:

> This Court has considered the *combined culpability* of the Defendants, the desirability of discouraging others from similar conduct, the impact of the judgment on the parties and innocent third persons and has also considered the *necessity of preventing unnecessary homicides*, especially in cases where the facts and circumstances are similar to those that took the life of Norma Hoffmann and Thomas Eugene Clardy. . . .
>
> . . . .
>
> . . . There was *no* evidence that the verdict in this case was based on bias, passion, prejudice, corruption or other improper motive. . . . The jurors acted responsibly and conscientiously throughout a well tried case. . . . The jury's verdict for 2.75 million dollars was consistent with the evidence and the Court's instructions, and, after due consideration, the Motion of the Defendants [for JNOV or for New Trial—see Petition at 69a] was previously DENIED the 11th day of May, 1988.

Pet. at 15a-16a (emphasis added).

Petitioners appealed, as of right, to the Alabama Supreme Court.[4] The justices of that court unanimously (6-0) found "no constitutional basis for reversal," Pet. at 13a, and "no basis for reversal on non-constitutional grounds." *Id.* Petitioners then filed a motion for rehearing or, alternatively, for a stay of execution of the judgment. On September 8, 1989, the Alabama Supreme Court, again unanimously, denied a stay. *See* Pet. at 14a. Although the court issued no opinion with its denial, two justices concurred specially to emphasize that:

> . . . punitive damages in a wrongful death case, such as the case here, *are different in nature from punitive damages in any other type of tort action in Alabama.* The defendants' constitutional arguments

---

[4] Defendant James Kervin did not appeal.

> concerning this punitive damages award must be considered in a *different* light than constitutional challenges to punitive damages awards in *other* tort actions, because in Alabama, only punitive damages are recoverable in a wrongful death action.

Id. (emphasis added).

Petitioners sought a stay of the judgment from Circuit Justice Kennedy, who denied a stay on September 20, 1989. Petitioners resubmitted their application for a stay to Justice Stevens, who granted a stay on September 25, 1989, pending further order of the Court. On October 10, 1989, the full Court granted the stay, pending its action on the instant petition.

SUMMARY OF ARGUMENT

The unique and atypical circumstances of this case make it an inappropriate vehicle for considering whether the Due Process Clause limits jury discretion to determine an appropriate award in the typical punitive damages case. First, Alabama provides extraordinary safeguards to ensure that punitive damage awards are fair and reasoned, including the right to a post-verdict *evidentiary* hearing to challenge the size of the award, appeal as of right, and *de novo* review. Second, although in typical cases the excessiveness of a punitive award can be evaluated by reference to the size of the compensatory award, that standard could not be employed to evaluate the propriety of this award because this case arose under a unique wrongful death statute that permits only punitive awards. Point I.A.

Because of its facts, this case does not present a substantial federal question, and it fails to meet the other enumerated criteria of S. Ct. R. 17. The decision of the Alabama Supreme Court is not at variance with any other court. The due process limitation on jury discretion urged by petitioners finds *no* support in civil law, and has been rejected by this and lower courts even in criminal proceedings. Point I.B.

There is no basis in the text of the Due Process Clause, its history, or the caselaw, for the *substantive* limit on state power to permit joint and several liability for jointly culpable tortfeasors that petitioners propose. Nor is there a common law consensus requiring apportionment, as petitioners mistakenly claim. Petitioners are asking the Court to make a substantive policy choice that should be left to legislative judgment. Point II.A.

Furthermore, this would be an inappropriate case for considering the apportionment question petitioners raise. Petitioner Clardy's decedent engaged in reprehensible conduct that caused the death of respondent's minor daughter. He was drag racing, while drunk, at 80 MPH in a residential neighborhood on the wrong side of a double yellow line when his car smashed head-on into hers. The jury found that he was more culpable than the codefendant with whom he was racing. There is no dispute that the crash was "entirely the combined and concurring fault" of petitioner's decedent and the codefendant. Petition at 3a. Thus, this is not a case in which a less culpable defendant has been assessed damages occasioned largely by the unforeseeable acts of a more culpable defendant. Point II.B.

REASONS FOR DENYING THE WRIT

Petitioners ask the Court to review two questions involving the Due Process Clause of the Fourteenth Amendment: (1) whether that Clause limits "undue" jury discretion to fix the amount of punitive damages that may be awarded if there is no "express statutory limit," and if so, what restrictions as to amount are required by that Clause; and (2) whether that Clause precludes imposing "a single punishment on multiple defendants for a single instance of wrongful conduct without regard to their relative culpability." Pet. at i.[5]

---

[5] For respondent's formulation of the Questions Presented *see supra* at i.

I. THE COURT SHOULD NOT GRANT REVIEW IN THIS CASE TO DECIDE WHETHER THE DUE PROCESS CLAUSE LIMITS THE SIZE OF PUNITIVE DAMAGE AWARDS.

A. The Present Case Is *Sui Generis* And Is Not An Appropriate Vehicle For Considering Whether The Due Process Clause Imposes Substantive Or Procedural Limits On The Size Of Punitive Damage Awards.

It is not enough that a question be worthy of the Supreme Court's consideration in the abstract. The case in which the question is raised must present "special and important reasons" deserving review. Sup. Ct. R. 17.1.[6] Assuming, without conceding, that whether the Due Process Clause limits the size of punitive damage awards is a federal question of substance, does not mean this case is a proper vehicle for deciding that general question:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or episodic.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955) (citations omitted); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). This case is not an appropriate vehicle for resolving that general due process question for several reasons.

---

[6] Because the other enumerated criteria in Rule 17 are clearly inapplicable, petitioners only seek review by arguing that this case raises an important question of federal law that should be settled by this Court. *See* Sup. Ct. R. 17.1(c).

1. *Alabama provides substantial and perhaps unique standards and procedures for assessing and reviewing punitive damage awards.*

Although some members of the Court have expressed concern about punitive damage awards, they have not expressed concern about punitive damages *per se*. The concerns expressed have been the possibility that verdicts may result from bias, passion or prejudice and be employed "to punish unpopular defendants," *Electrical Workers v. Foust*, 442 U.S. 42, 50-51 n.14 (1979); the "lack of sufficient standards governing punitive damage awards," *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828 (1986);[7] the "grant of wholly standardless discretion to determine the severity of punishment," *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, —, 108 S.Ct. 1645, 1656 (1988) (O'Connor, J., concurring in part and concurring in the judgment); and "undue jury discretion to award punitive damages," *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2921 (1989), in the absence of "statutory (or at least common law) standards." *Id.* at 2923 (Brennan, J., concurring).

Those concerns are not presented by this case. Petitioners do not argue that this award was the result of bias, passion, prejudice, corruption, or improper motive, and the trial court found as a fact that it was not. Pet. at 16a. Nor was this damage award the product of "wholly standardless" and "undue" jury discretion. To the contrary, in Alabama wrongful death actions, under

---

[7] Although this concern has been expressed in *Lavoie*, an Alabama case, *Lavoie* is clearly distinguishable. That case involved a bad-faith refusal to pay an insurance claim in which compensatory damages were also awarded. Alabama's wrongful death statute, which bars compensatory damages, was not at issue. Since *Lavoie*, as respondent will explain, the Alabama Supreme Court has adopted additional standards and procedures to govern the assessment and review of punitive damage awards. *See Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).

recently augmented common law standards and procedures, jury discretion is constrained by very specific standards and instructions, and jury verdicts are subject to searching and perhaps unique post-trial review by trial and appellate courts to ensure those verdicts are fair and reasonable. "If a defendant is dissatisfied with a jury's verdict, and feels that it is excessive, or otherwise flawed, he is entitled to the protection of a variety of safeguards." *Central Alabama Electric Cooperative v. Tapley*, No. 87-1188 (Ala. May 12, 1989); Pet. at 32a, 40a [hereinafter all citations to *Tapley* will be to the Petition].

Immediately after the Court's decision in *Lavoie* in 1986, the Alabama Supreme Court fashioned additional procedural and substantive safeguards to ensure fair and consistent administration of punitive damages. Out of caution to prevent punitive damages from being tainted by bias or prejudice, Alabama, unlike other states, strictly forbids the introduction of any evidence to the jury concerning the wealth or financial circumstances of either party. *See Industrial Chemical and Fiberglass Corp. v. Chandler*, Nos. 86-381, -385 (Ala. June 23, 1989), Pet. at 17a, 22a [hereinafter all citations to *Industrial Chemical* will be to the Petition]; *Green Oil Co. v. Hornsby*, 539 So.2d 218, 222 (Ala. 1989); *Southern Life & Health Insurance Co. v. Whitman*, 358 So.2d 1025 (Ala. 1978).

In addition, Alabama provides another, and perhaps unique, procedural protection. In *Hammond v. City of Gadsden*, 493 So.2d 1374, 1378-79 (Ala. 1986), and *Hornsby*, 539 So.2d at 223-24, the Alabama Supreme Court required trial courts to hold *evidentiary* hearings and to provide written reasons for accepting or modifying the jury's verdict. These hearings are known as "*Hammond* hearings."

During these post-verdict *Hammond* hearings, the trial court is required to analyze whether the verdict was "af-

fected by bias, passion, prejudice, corruption, or other improper motive or conduct," *Hornsby*, 539 So.2d at 222, and to analyze many other factors. For example, in deciding whether a particular award is excessive under *Hammond* and *Hornsby*, the trial court is authorized to consider the following "nonexclusive" factors:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that has actually occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
>
> (2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.
>
> (3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.
>
> (4) The financial position of the defendant would be relevant.
>
> (5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
>
> (6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.
>
> (7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Hornsby, 539 So.2d at 223-24, *quoting Aetna Life Insurance Co. v. Lavoie*, 505 So.2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially); *see Tapley*, Pet. at 40a-41a. The defendant is permitted to present evidence at such a hearing to show that the jury's verdict is "unreasonable, disproportionate, or economically destructive" —a due process protection for defendants that may be unique to Alabama. *Industrial Chemical*, Pet. at 29a; *Hornsby*, 539 So.2d at 224.[8]

The defendant may appeal "as a matter of right" from the trial court's denial of motions for remittitur or new trial, and "is entitled to a *de novo* review of the jury's verdict on appeal." *Tapley*, Pet. at 40a; Ala. Code § 12-22-71. Thus, appellate courts are free to make their own independent assessment of the factual basis for the amount of the award, and can "order a new trial due to the excessiveness of the verdict," or can "order a new trial unless the plaintiff accepts a remittitur." *Tapley*, Pet. at 40a (citations omitted); *see* Ala. Code § 12-22-71.[9] "From these considerations (and from those reaffirmed in *Hammond v. City of Gadsden*, 493 So.2d 1379 (Ala. 1986), emerge two related protections: First, a requirement of 'reasonableness, of proportionality, of sensible relation between punishment and offense,' and, second, a guarantee of 'not just bare survival, but continued productive economic viability.'" *Industrial Chemical*, Pet. at 28a.[10]

---

[8] "In sum, 'fundamental fairness' requires that the defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the punitive award is unreasonable, disproportionate, or economically destructive. . . ." *Industrial Chemical*, Pet. at 28a-29a.

[9] *See* Ala. R. Civ. P. 59(f): "The court may, on a motion for a new trial, require a remittitur as a condition to the overruling of the motion for new trial; . . ."

[10] Petitioners completely ignore *Industrial Chemical's* "guarantee" of continued economic viability and cite *Tapley* for the propo-

Petitioners had the benefit of all of these standards and procedures. The jury was properly instructed as to the law of punitive damages, including the admonition that the "amount of damages should be directly related to the amount of wrongdoing on the part of the Defendant, or Defendants," Trial Record at 853, and those instructions are not challenged here. After the jury's verdict, defendants filed Motions for Judgment Notwithstanding the Verdict, a New Trial, and a Remittitur. The trial court conducted an extensive evidentiary post-trial hearing on these issues, at which defendants introduced additional documents and the testimony of three witnesses. Post-Trial Record at 53-101; Post-Trial Exhibits 1-4. The Court denied defendants' post-trial motions, and subsequently entered an order setting forth its reasons for finding that the award was not excessive. *See* Pet. at 15a, 69a-82a. Petitioners appealed that decision as of right to the Alabama Supreme Court, which conducted a *de novo* review and unanimously affirmed the trial court in its entirety. *See* Pet. at 1a.

Because Alabama law gives defendants fair notice of the factors that will be considered in assessing and reviewing punitive damage awards, and provides extraordinary post-verdict procedures to ensure that those factors have been fairly applied, petitioners are forced to argue that a factor-based system, with procedures to ensure their fair application, is not enough to satisfy the requirements of due process. Instead of case-by-case evaluation and weighing of the relevant factors, petitioners

---

sition that in some cases Alabama law might permit the economic destruction of a defendant. Pet. at 7, 15. That possibility, though noted in passing in *Tapley*, was expressly reserved for "the rarest cases, involving the most egregious conduct. . . . [I]n the typical punitive damages case, the award should punish without destroying." *Tapley*, Pet. at 41a-42a. In any event, that issue is not raised by the facts of this case. The Petition does not contend that petitioners would be economically destroyed by the award if it were allowed to stand.

insist that due process requires specific legislative standards from which the amount of monetary punishment that will be appropriate in a given case can be derived with near mathematical precision to limit jury (and judicial) discretion.

Of course, it would be impossible for a legislature to devise standards that would specify an individually appropriate punishment for every conceivable case in which punitive damages could be awarded. The whole point of punitive damage awards is that they should be individually tailored to the circumstances of each case to provide an appropriate measure of punishment and deterrence. Therefore, it would be inconsistent with the very purpose of such awards for a legislature to provide, for example, that every defendant, regardless of the nature of his/her wrongdoing, should be assessed punitive damages equivalent to five percent of his/her income; or that in all wrongful death cases, regardless of the wealth of the defendant, the defendant should pay a punitive award of $3,000,000; or that in all cases of bad faith refusal to pay an insurance claim the punitive award should be ten times the policy value, regardless of the type of policy involved or the number of policyholders who were subjected to the same wrongful refusal. That is why the states have left to juries and reviewing courts the task of weighing the relevant factors and deciding the precise award that would be appropriate for each case.

This type of case-by-case evaluation of the relevant factors and application of those factors to the facts of a particular case is the backbone of much of our law. How could a legislature determine in advance what disposition would be in "the best interests" of an individual child, or what precise rate would be "fair and reasonable" for an individual rate-making proceeding that will be conducted ten years in the future, or whether the steps taken by a particular fiduciary in a particular situation will constitute "due diligence"? Due process does not require that

kind of mechanical decision-making in those areas of the law, or in the assessment and review of punitive damage awards.

Perhaps because they recognize the unworkability of their proposal to limit jury and judicial discretion, petitioners only advance that proposal in cases where the *legislature* has not set an upper limit, or cap, on the amount of punitive damages a jury will have discretion to award.[11] Apparently, under the approach advocated in the Petition, if the Alabama legislature *had* imposed a statutory cap on punitive damage awards in wrongful death cases, the standards and procedures Alabama already has in place for assessing and reviewing those awards would be sufficient to meet the requirements of due process for *any* award within that limit. Thus, unless there is some substantive limitation in the Due Process Clause that would prohibit Alabama from authorizing a $2.75 million punitive award in the circumstances of this case—a proposition petitioners have not yet urged—petitioners are forced to argue that this award violates due process simply because Alabama has chosen not to impose a statutory cap it would have had the constitutional power to authorize.

Although petitioners characterize this argument as a procedural lack of notice, it is really a substantive due process argument in disguise. Everyone in Alabama is on notice that the legislature has chosen to cap punitive damage awards in some types of cases, but not in wrongful death cases. *See* Pet. at 14-15.[12] Thus, everyone

---

[11] The first question presented asks only whether due process limits jury discretion to award punitive damages "in the absence of any express statutory limit . . . ." Pet. at i.

[12] The legislature obviously decided that punishing and deterring wrongful death is more important than punishing and deterring lesser forms of wrongdoing. The legislature's deliberate decision not to impose an arbitrary statutory cap on punitive awards in wrongful death cases rationally furthers the state's surpassing interest in the preservation of human life.

knows that if a person wrongfully causes death, the only limits on the punitive damages that can be awarded are the common law limits. But more importantly, everyone also has notice of what constitutes wrongful death under Alabama law, so that individuals conforming their conduct to the law know they can escape liability for any punitive award. And petitioners had notice, from prior Alabama decisions,[13] that if they violated the wrongful death statute, they could be subjected to a punitive award higher than the award the jury actually imposed in their case, so they cannot claim they would have obeyed the law if they had known the award could be that high.

Due process does require notice of the elements of the substantive offense, so that persons can conform their conduct to the law, but it does not require notice of the precise or maximum punishment that can be imposed for violation of the law.[14] It is not the purpose or function of the due process clause to enable potential law breakers to engage in a cost-benefit analysis of the likely or maximum cost of violating a particular law compared with the expected financial or other gain from that violation.

---

[13] *Industrial Chemical and Fiberglass Corp. v. Chandler*, Pet. at 17a ($2.5 million to each of two plaintiffs in 1980 death); *Black Belt Wood Co., Inc. v. Sessions*, 514 So.2d 1249 (Ala. 1986) ($3.5 million award in 1980 death); *see* 2 Ala. Trial L. J. 16 (Summer 1983) (*Hicks v. Ireland*) ($25 million jury verdict in wrongful death action in Montgomery County Circuit Court); 3 Ala. Trial L. J. 46 (Winter 1984) (*Hickman v. Lamplighter Dinner Theatre*) ($10,050,000 jury verdict in deaths of two minors in automobile crash) *reported in The Advertiser* (Montgomery, Ala.), May 4, 1984, at C1, col. 6 ("Jury Finds Against Restaurant").

[14] Due Process does require that a sentence not be based on illegal considerations, *United States v. Lemon*, 723 F.2d 922 (D.C. Cir. 1983), on an error of fact, *United States v. Tucker*, 404 U.S. 443 (1972), or on vindictiveness, *North Carolina v. Pearce*, 395 U.S. 711 (1969). None of these considerations are present in this case.

2. *Unlike the typical case, the propriety of this punitive award cannot be measured by reference to a compensatory award.*

Although some members of the Court have expressed concern that particular punitive damage awards might implicate the due process clause, that concern has always been raised in the context of cases in which there was a substantial disparity between the compensatory damages and the punitive damages. *See, e.g., Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., concurring in part and dissenting in part) ($51,146 in compensatory damages; $6 million in punitive damages).[15] Yet, in 1988 and 1989 the Court has declined to review every case asserting even this due process "disproportionality" issue.[16] Because this case has no proportionality issue, *a fortiori*, it is even less appropriate for review.

In cases where there is a compensatory award, defendants have argued that due process requires proportional-

---

[15] *See Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645 (1988) ($20,000 in compensatory damages; $1.6 million in punitive damages); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) $1,378 in compensatory damages; $3.5 million in punitive damages).

[16] *See Longview Fibre Co. v. Jeannette Paper Co.*, 58 U.S.L.W. 3200 (U.S. Oct. 2, 1989) (No. 88-2051); *Alcolac, Inc. v. Elam*, 58 U.S.L.W. 3200 (U.S. Oct 2, 1989) (No 88-1992); *Goodyear Tire & Rubber Co. v. Hodder*, 109 S. Ct. 3265 (1989); *Miller v. Cudahy*, 109 S. Ct. 3265 (1989); *Metromedia, Inc. v. April Enterprises, Inc.*, 109 S. Ct. 3242 (1989); *Great Republic Insurance Co. v. Cheval*, 109 S. Ct. 3218 (1989); *Getty Petroleum Corp. v. Salem Heat and Petroleum Corp.*, 109 S. Ct. 1642 (1989); *Eaton Corp. v. PKL Co.*, 109 S. Ct. 1933 (1989); *Alwan Brothers Co. v. Gnidovec*, 109 S. Ct. 1315 (1989); *Nationwide Mutual Insurance Co. v. Clay*, 109 S. Ct. 863 (1989); *Mutual Life Insurance Co. of New York v. Estate of Wesson*, 108 S. Ct. 2035 (1988); *Ohio Casualty Insurance Co. v. Downey Savings and Loan Ass'n*, 108 S. Ct. 2023 (1988); *see also American General Life & Accident Insurance Co. v. Miller*, 108 S. Ct. 2007 (1988) (appeal dismissed for want of substantial federal question).

ity between the compensatory award and the punitive award.[17] If that argument were accepted, the Court could fashion a relatively objective standard (for example, that the punitive award should not exceed three times the compensatory award), and could then review the excessiveness of punitive awards in that and other cases by reference to that standard. But no such relatively objective standard could be fashioned to resolve *this* case. Other than the common law standards, which have already been applied, no other standard for measuring the propriety of the award in this case comes readily to mind, and petitioners have not even *suggested* any such standard.

If the Court is inclined to consider fashioning a judge-made constitutional rule for measuring the proprietary of punitive damage awards, it should first confront that issue in the *typical* case, where a standard requiring proportionality between compensatory and punitive awards is at least a theoretical possibility.

This case offers a very circumscribed and rare set of facts occurring only in wrongful death cases in Alabama. It is at one end of a broad spectrum of punitive damage cases—it does not involve an economic, nonviolent tort caused by a large out-of-state for-profit corporation pitted against a favored local plaintiff.[18] Instead, it involves an

---

[17] That is not the rule at common law, for very good reason. Tortious conduct may cause little or no actual injury, but may merit a substantial punitive award in order to deter similar conduct in the future. For example, suppose a hunter pursues his prey across a campground and sprays a crowd of campers with a shotgun blast. Even if the worst injury was minor damage to a camper's tent, that reckless conduct would merit a substantial punitive award. That is why the common law requires proportionality between the punitive award and the nature of the wrong, not between the award and the actual injury.

[18] In this case, one of Thomas Clardy's sisters was a local district judge and another was a local district attorney.

egregious and wanton disregard for human life that is also criminal under state law,[19] a case quintessentially deserving of substantial punitive damages.[20] Because this case presents an issue arising from a unique statute [21] in a narrow context, *i.e.*, a wrongful death action in which the Court could not consider whether due process required proportionality between the compensatory and punitive awards, it is not an appropriate vehicle for resolving more general due process concerns. Because no other jurisdiction has a wrongful death statute that bars the award of compensatory damages, *see* C. GAMBLE, ALABAMA LAW OF DAMAGES 490 (2d ed. 1988),[22] this case would not be

---

[19] Clardy and Kervin's conduct is punishable under a variety of criminal statutes under Alabama law. *See e.g.*, murder, defined, *inter alia*, as causing death under circumstances manifesting extreme indifference to human life, Ala. Code § 13A-6-2(a)(1); manslaughter, defined, *inter alia*, as recklessly causing the death of another person, Ala. Code § 13A-6-3(a)(1); and criminally negligent homicide, defined as causing the death of another person by criminal negligence. Ala. Code § 13-6-5(a). Alabama also criminalizes improperly overtaking a vehicle on the left, Ala. Code § 32-5A-84; driving at an unreasonable and imprudent speed, Ala. Code § 32-5A-190; "drag racing," Ala. Code § 32-5A-178; and driving under the influence of alcohol. Ala. Code § 32-5A-191.

[20] The Court has repeatedly noted that punitive damages may be awarded "to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974); *accord Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Smith v. Wade*, 461 U.S. 30, 54 (1983).

[21] *Cf. Curry v. Baker*, 479 U.S. 1301, 1302 (Powell, Circuit Justice 1986) (application for stay denied in case presenting "unique facts closely tied to Alabama election law and rules").

[22] "The characteristic of the Alabama wrongful death statutes that makes them distinguishable from all other statutes is the punitive construction judicially applied to the statutes. All wrongful death statutes in other jurisdictions base recovery upon compensatory considerations." *Id.* In 1956, the Court noted that "Alabama and Massachusetts award only punitive damages for wrongful deaths." *Massachusetts Bonding & Insurance Co. v. United States*, 352 U.S. 128, 130-31 (1956). Massachusetts subsequently amended

as appropriate for review as a case involving a punitive damage award under a more typical statute.[23]

B. The Due Process Limitation On Jury And Judicial Discretion Urged By Petitioners Finds No Support In Either Civil or Criminal Law.

1. *Civil law.* Petitioners have been unable to cite any civil cases that adopt the due process limitation on punitive awards they urge, because there are none. To the contrary, courts that have addressed the issue have rejected any such due process limitation. *See, e.g. Miller v. Cudahy Co.*, 858 F.2d 1449, 1459 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989) ("appellants have cited no persuasive federal constitutional authority to support their argument" [that the fourteenth amendment requires limits on award of punitive damages]).

2. *Criminal law.* The only cases petitioners cite to support their argument are cases involving criminal penalties.[24] But that reliance is misplaced. As this Court

---

its tort claims act to provide for compensatory damages, *see Hoyt v. United States*, 286 F.2d 356-57 (5th Cir. 1961); *Guy v. Johnson*, 448 N.E.2d 1142-43 (Mass. App 1983), leaving only Alabama with this unique statute.

[23] *See Santosky v. Kramer*, 455 U.S. 745, 749 (1982) (case affecting 37 jurisdictions); *People v. O'Neill*, 359 U.S. 1, 3 (1959) (concerning constitutionality of statute in force in 43 jurisdictions); *McGee v. Int'l Life Insurance Co.*, 355 U.S. 220-21 (1957) ("case raised important questions, not only to California but to other States which have similar law.").

[24] *See* Pet. at 15-16. Using these cases, petitioners argue, as noted, *supra*, that the precise due process vice of Alabama's punitive damage system is that it provides no notice regarding the maximum punishment that may be imposed for egregious and harmful conduct, including wrongful death, and demand that the legislature should either place a cap on punitive damages or announce the amount of damages for every possible act deserving of punitive damages. None of the cases cited by petitioners so hold. In *United States v. Batchelder*, 442 U.S. 114 (1979), the Court held that the district judge could impose a maximum sentence under one federal

has noted, "legislatures [are] free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion).[25] And even in capital cases, the constitutional limits on jury discretion are based on the Eighth Amendment, *not* on the Due Process Clause. Indeed, in *McGautha v. California*, 402 U.S. 183 (1971), the Court squarely held that the total absence of *any* standards to guide or limit jury discretion in capital cases did not violate the Due Process Clause.[26]

---

law although the same conduct was also proscribed by another federal statute, but with a significantly lower maximum sentence. *Berra v. United States*, 351 U.S. 131 (1956), held that a defendant had no right to a jury instruction permitting the jury to make a choice between two criminal statutes when the prosecutor charged the defendant under the statute with more onerous penalties. In fact, the dissenting opinion, the only part of the decision that petitioners cite, supports respondent. The dissent agreed that the legislature "may vest the judge and the jury with broad power to say how much punishment shall be imposed for a particular offense," and recognized that differences in penalties may arise as a result of "different appraisals given the circumstances of different cases by different judges and jury." *Id.* at 140. Finally, *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), does not further petitioners' argument. There the Court found violative of due process a law allowing juries to punish criminal defendants for "reprehensible" conduct even when the defendant was *acquitted* of the charged offense. Because that was tantamount to finding defendants for "reprehensible" conduct without defining that term, the Court found the law unconstitutionally vague. The Court noted, however, that it "intend[ed] to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." *Id.* at 405 n.8.

[25] *See also Solem v. Helm*, 463 U.S. 277, 290 (1983) referring to the "broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals."

[26] Due process challenges to standardless jury sentencing have been universally *rejected*. *See Garcia v. United States*, 769 F.2d

More recently, the Court has upheld, against constitutional attack, an Alabama sentencing scheme much like that used by Alabama in imposing and reviewing punitive damage awards. *See Baldwin v. Alabama*, 472 U.S. 372 (1985). Under Alabama capital sentencing procedures, once the jury convicts a defendant of aggravated murder it must sentence the defendant to death. However, that sentence is not final. It must be reviewed by the trial judge, who hears evidence of aggravating and mitigating circumstances and, after weighing the circumstances, sentences the defendant to death or to life imprisonment without parole. The defendant in *Baldwin* alleged, in part, that "the jury's mandatory sentence was unconstitutional because it was unguided, standardless, and reflected no consideration of the particular defendant or crime. . . ." *Id.* at 378.[27] The Court rejected that argument, affirming the defendant's death sentence, in large part, because the trial judge conducted a post-verdict evidentiary during which evidence was introduced as to aggravating and mitigating circumstances.

Furthermore, the Court has consistently expressed its approval of juries as "the conscience of the community." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). *See also Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (sentencing decisions of juries are "a significant and *reliable objective index* of contemporary values") (emphasis added). That those community values cannot be reduced to a precise formula, either in criminal sentencing or in

---

697, 699 & n.1 (11th Cir. 1985); *R.G. Britton v. Rogers*, 631 F.2d 572, 578-581 (8th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981); *Vines v. Muncy*, 553 F.2d 342, 347-348 (4th Cir.), *cert. denied*, 434 U.S. 851 (1977). *Cf. Stevens v. Armontrout*, 787 F.2d 1282, 1284 (8th Cir. 1986) (upholding against due process challenge a 200 year bench sentence under a statute that permitted sentence between ten years and "any number of years").

[27] The defendant also claimed that the judge's ultimate decision was impermissibly infected by the jury's mandatory sentence of death.

fixing punitive damage awards, is not a vice but a virtue of the jury system:

> [T]he inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that *defy codification* and that 'buil[d] discretion, equity, and flexibility into a legal system.' McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the *fundamental role of discretion* in our criminal justice system.

McCleskey v. Kemp, 481 U.S. 279, 311 (1987) (citation omitted) (emphasis added).

It is inconceivable that the Court would rule that the Due Process Clause *does* limit jury discretion to assess punitive damage awards, but does *not* limit jury discretion in criminal proceedings, where the injury to the defendant can be irreparable. Accordingly, reversal of the decision below would effectively require the Court to overrule this line of criminal precedents. If the Court now wishes to consider whether the Due Process Clause places substantive or procedural limits on jury discretion, it would be more appropriate to reconsider that issue first in the context of criminal proceedings.

II. THE COURT SHOULD NOT GRANT REVIEW TO DECIDE WHETHER THE DUE PROCESS CLAUSE PRECLUDES STATES FROM CHOOSING TO ALLOW JOINT AND SEVERAL LIABILITY FOR PUNITIVE DAMAGES ON JOINTLY CULPABLE TORTFEASORS.

Petitioners also urge the Court to grant review to determine whether the Due Process Clause limits the *substantive* authority of the States to permit joint and several liability for punitive damages.[28] As is true with

---

[28] Petitioners acknowledge this question is "distinct" from their first question. Pet. at 8, n.4. No member of the Court has previously expressed concern about this question.

Question One, there is no conflict, or even inconsistency, between the ruling of the Alabama Supreme Court and any decision of this Court, or of any other State or federal court, with respect to this question. Thus, review is appropriate only if the question is sufficiently important to warrant this Court's immediate attention. *See* S. Ct. R. 17. Petitioners have not demonstrated that this is a substantial question that should be settled at this time. Furthermore, this question is not properly presented by the facts of this case.

A. There Is No Authority For The Substantive Limit On Punitive Damage Awards Petitioners Propose, And No Reason For The Court To Consider Creating Such A Limit.

Nothing in the text of the Due Process Clause, or in the history of its passage, supports the substantive limit urged by petitioners. Petitioners are asking the Court to establish "judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). No case cited by petitioners—and no case of which respondent is aware—has ever held or even suggested that the Due Process Clause limits state authority to impose joint and several liability for punitive damages on joint tortfeasors.[29] Indeed, prior to this case, the constitutional question appears never to have been addressed.

---

[29] *Washington Gas-Light Co. v. Lansden*, 172 U.S. 534 (1899), provides no support for petitioners. There the Court simply held that, *given the existence of the common law rule that all defendants must be liable for any punitive damages award*, an award against all could not be based on evidence about the *wealth* of only one. The Court did not even discuss the purported need for apportionment of punitive damages according to individual *culpability*, much less suggest that the Due Process Clause required such a result. In Alabama, the jury is precluded from hearing evidence as to the wealth of the defendant. *See, supra*, at Point I(A)(1).

Because neither the text nor the history of the Due Process Clause, or of any case interpreting it, supports a due process "right" to individual apportionment of punitive damages, petitioners seek to justify this new right on the basis of a claimed (but non-existent) common law consensus requiring apportionment. But petitioners offer no reason why such a common law consensus would give rise to a fundamental substantive right protected by the Due Process Clause. In particular, petitioners make no claim that apportionment of punitive awards is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if it were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Such a claim would be implausible on its face. Nor have petitioners argued that the right to apportionment of punitive awards is "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.). The relatively recent emergence of the consensus claimed by petitioners forecloses any appeal to history and tradition. Thus, nothing in this Court's jurisprudence supports petitioners' endeavor to transform a common-law policy choice into a constitutional entitlement.

Furthermore, the consensus claimed by petitioners does not exist. The cases cited in the Petition do not even remotely support petitioners' contention that "a substantial majority of States that have considered the question have ruled that defendants should not be held jointly and severally liable for punitive damages." Pet. at 20. Several authorities cited by petitioners simply do not address whether apportionment is required.[30] Several of the cited

---

[30] For example, both *Rubi v. Transamerica Title Ins. Co.*, 131 Ariz. 403, 641 P.2d 891 (Ct. App. 1981), and *Fredeen v. Stride*, 269 Or. 369, 525 P.2d 166 (1974), considered whether punitive damages could be recovered against one defendant when not all defendants had acted with sufficient culpability to warrant an award of

cases *permit* apportionment of punitive damages in an appropriate case, but do not *require* it.[31] At most, five of the state cases cited by petitioners definitively hold that joint and several liability for punitive damages is inappropriate.[32] And as petitioners acknowledge, at least eight States authorize joint and several liability for punitive damages. Pet. at 21 n.21. Thus, the cases on which petitioners rely refute the claimed existence of a common law consensus prohibiting the imposition of joint and several liability for punitive damages.

This question is a policy question that states should remain free to resolve. As even petitioners' survey of common law precedent makes clear, the states are in-

---

punitive damages. These cases rejected the old common law rule that a plaintiff could not recover punitive damages against any defendant unless it proved an entitlement to such damages against all defendants. The cases thus permitted an award of punitive damages against the only defendant found to have acted in a sufficiently egregious manner to warrant such damages. The cases did not even discuss the issue of apportionment among defendants who have been found liable for punitive damages. Similarly, *Mauk v. Brundage*, 68 Ohio St. 89, 67 N.E. 152 (1903), held only that punitive damages could not be awarded against a defendant who failed to act with the standard of actual malice required by the common law as a prerequisite for any award of punitive damages. And *Freeman v. Sproles*, 204 Va. 353, 131 S.E.2d 410 (1963), held only that an employer could not be held vicariously liable for punitive damages against an employee if the employee was not acting within the scope of his employment. Apportionment was not at issue.

[31] *E.g., St. Louis & South West Ry. Co. of Texas v. Thompson*, 102 Tex. 89, 113 S.W. 144 (1908); *Louisville & Nashville R.R. v. Roth*, 130 Ky. 759, 114 S.W. 264 (1908); *Edquest v. Tripp & Dragstedt Co.*, 93 Mont. 446, 19 P.2d 637 (1933); *Hotel Riviera, Inc. v. Short*, 80 Nev. 505, 396 P.2d 855 (1964); *Johnson v. Atlantic Coast Line R.R. Co.*, 142 S.C. 125, 140 S.E. 443 (1927).

[32] *Thompson v. Catalina*, 205 Cal. 402, 271 P. 891 (1928); *Shields v. Martin*, 109 Idaho 132, 806 P.2d 21 (1985); *Nelson v. Halvorson*, 117 Minn. 255, 135 N.W. 818 (1912); *Embrey v. Holly*, 293, Md. 128, 442 A.2d 966 (1982); *Coty v. Ramsey Associates, Inc.*, 149 Vt. 451, 546 A.2d 196 (1988).

volved in a salutary common-law search for appropriate solutions to the issue of multiple liability for punitive damages. Legislative processes also remain open. Judicial policymaking in the guise of recognizing a "fundamental" substantive due process right to apportionment would not only freeze common law development at this immature stage, but would also throw into doubt numerous areas of settled law. For example, adoption of the principle espoused by petitioners would call into serious question this Court's rulings that in appropriate circumstances even *criminal* liability may be imposed without any showing of fault on the defendant's part. *E.g.*, *United States v. Dotterweich*, 320 U.S. 815 (1943); *United States v. Balint*, 258 U.S. 250 (1922). Petitioners' arguments also call into question the imposition of joint and several liability on antitrust coconspirators for treble damages, which indisputably have a punitive component. Indeed, there is no apparent basis for limiting the due process "right" petitioners seek to create to punitive damages. Such common-law concepts as enterprise liability and strict liability, and such legislative solutions as workers' compensation—all of which further state policy goals by assessing liability irrespective of fault, or the degree of fault—would be seriously undermined by a requirement that sanctions be premised on individual culpability.

Petitioners are therefore forced to rely exclusively on the kinds of amorphous appeals to "fundamental fairness" the Court has repeatedly rejected as a justification to find new substantive rights in the broad procedural guarantees of the Fourteenth Amendment.[33]

---

[33] Petitioners' reliance on *Mathews v. Eldridge*, 424 U.S. 319 (1976) is misplaced. The approach adumbrated in *Mathews* is meant to guide resolution of what *procedures* government must afford in connection with the deprivation of protected substantive interests. But petitioners are not claiming a need for additional procedures prior to the imposition of punitive damages. To the contrary, petitioners seek a *substantive* constitutional limitation on

B. This Case Would Be An Exceedingly Inappropriate Vehicle For Considering The Apportionment Question.

Even if the apportionment question were an important question of federal law—and it is not—the present case does not offer an appropriate opportunity for resolving that question. Although petitioner Clardy's decedent and a codefendant were held jointly and severally liable for a punitive damages judgment, petitioner Clardy cannot plausibly claim that her decedent's conduct was insufficiently reprehensible to justify punitive damages or that his conduct was less reprehensible than that of the codefendant. Petitioner Clardy's decedent engaged in a drunken drag race. He drove his vehicle on the wrong side of the double yellow line during that race. And it was his vehicle that crashed into respondent's daughter and killed her. Understandably, given these facts, petitioners have not disputed the Alabama Supreme Court's findings that "the accident was entirely the combined and concurring fault" of petitioner Clardy's decedent and the codefendant. Opinion, Pet. at 3a. Thus, this case does not present the issue of the least or less culpable defendant being assessed damages occasioned largely by the acts of a more culpable defendant. Nor is this a case in which one defendant has been assessed damages occasioned in part by the independent and unforeseeable acts of another defendant.

Because petitioner Clardy's decedent was specifically found to be at fault for the accident, and acted with even greater indifference to human life than did the codefendant[34], the proposed constitutional protection for the least culpable defendant would not benefit petitioner

---

state remedial authority to impose punitive damages without a precise calculation of the relative culpability of joint tortfeasors.

[34] The jury found Clardy grossly negligent and the codefendant negligent. Clerk's Record at 168.

Clardy.[35] On this record, therefore, the apportionment question is wholly hypothetical and abstract. This Court "is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 409 (1900); *accord Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-74 (1955).

---

[35] Nor is there any basis to argue that it would be "fundamentally unfair" not to apportion damages between Eugene Clardy and Clardy Realty, Inc., because, as the Alabama Supreme Court found, "Clardy the individual and Clardy Realty, a sole proprietorship, are but a single legal entity," Opinion, Pet. at 4a, and petitioner "*Clardy* Realty, Inc., became the successor corportion to the interests and liabilities of Clardy Realty, a sole proprietorship." Opinion, Pet. at 11a. Thus, if the Court granted a writ of certiorari on the apportionment issue and reversed, it would be a simple matter for Debby Clardy and Clardy Realty, Inc., which is owned by Debby Clardy, to reimburse the other for its apportioned share. Indeed, petitioners could immediately implement that reapportionment without any intervention from this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD N. BERSOFF
BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400

RICHARD JORDAN AND
RANDY MYERS, P.C.
302 Alabama Street
Montgomery, AL 36104
(205) 265-4561

W. SIDNEY FULLER
28 South Court Square
Post Office Drawer 1637
Andalusia, AL 36240
(202) 222-4196
Attorneys for Respondent

October 12, 1989

* Counsel of Record